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IN THE

Supreme Court of the United States

OCTOBER TERM, 1964

No. 1072

MARDON R. WALKER,

Petitioner,

—v.—

THE STATE OF GEORGIA.

PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF GEORGIA

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IN THE

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MARDON R. WALKER,

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—v.—

THE STATE OF GEORGIA.

PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF GEORGIA

Petitioner prays that a writ of certiorari issue to review the judgment of the Supreme Court of Georgia, entered in the above-entitled case November 5, 1964, *infra*, p. 1a.

Citation to Opinion Below

The opinion of the Supreme Court of Georgia is reported at —— Ga. ——, 139 S. E. 2d 278 (1964), and is set forth in the Appendix hereto, *infra*, pp. 1a-14a.

Jurisdiction

The judgment of the Supreme Court of Georgia was entered November 5, 1964, *infra*, p. 15a. Motion for rehearing was denied by the Supreme Court of Georgia on November 19, 1964, *infra*, p. 16a. On February 9, 1965, Mr. Justice Goldberg signed an order extending petitioner's time for filing petition for writ of certiorari to and including April 17, 1965. Following this Court's decision in *Hamm* v. *City of Rock Hill*, 379 U. S. 306, a second motion for rehearing was filed, which was disallowed on March 15, 1965, *infra*, p. 17a.

The jurisdiction of this Court is invoked pursuant to 28 U. S. C. §1257(3), petitioner having asserted below and asserting here deprivation of rights secured by the Constitution of the United States.

Constitutional and Statutory Provisions Involved

1. This case involves Section 1 of the Fourteenth Amendment to the Constitution of the United States.

2. This case also involves the following statute of the State of Georgia:

Ga. Code Ann. §26-3005:

Refusal to leave premises of another when ordered to do so by owner or person in charge.

It shall be unlawful for any person, who is on the premises of another, to refuse and fail to leave said premises when requested to do so by the owner or any person in charge of said premises or the agent

or employee of such owner or such person in charge. Any person violating the provisions of this section shall be guilty of a misdemeanor and upon conviction thereof shall be punished as for a misdemeanor.

Questions Presented

1. Whether the decision below is in conflict with this Court's recent decisions holding that the Civil Rights Act of 1964 abates the prosecutions of peaceful sit-in demonstrators.

2. Whether petitioner's conviction enforced racial discrimination in violation of the Fourteenth Amendment.

Statement

Mardon R. Walker, an eighteen-year-old white student at Connecticut College for Women and during the 1963 Fall term an exchange student at Spelman College, a Negro women's college in Atlanta, was arrested January 13, 1964 and charged with violating Georgia Code Annotated, Tit. 26, §3005, which makes it a misdemeanor not to leave a restaurant after a request by the owner or person in charge (R. 840-841). She was indicted, tried, convicted, fined $1,000, and sentenced to twelve months at work on the public works of Fulton County and six months in jail, a total of eighteen months (R. 5). On appeal to the Georgia Supreme Court, her conviction was affirmed, *infra*, p. 14a.

Petitioner was one of three white and thirteen Negro students who entered Krystal's Restaurant at 70 Peachtree Street in Atlanta on January 13, 1964 (R. 736, 793).

Krystal's, part of a chain of five restaurants in Atlanta,[1] offers counter-stool type service for approximately 24-25 people (R. 753), is open 24 hours a day on week days, and serves roughly 1,000 people a day (R. 794). Miss Walker sat on a stool and ordered a hamburger, but the waitress ignored her. Miss Walker testified: "I didn't leave even when the waitress ignored me, hoping that eventually I would be served. . . ." (R. 842).

At Krystal's there was a standing order not to serve Negroes, or whites accompanied by Negroes, except on a take-out basis (R. 753, 764). Otherwise, the restaurant did not cater to any particular type of people (R. 753) and was open to the public.[2] Miss Walker's conduct was good; her dress was appropriate (R. 741-742, 809, 842).

When Miss Walker arrived, Mr. Hamea Quinn, Shift Manager for Krystal's, immediately called the police and Mr. Hilton J. Drury, City Manager of Krystal's (R. 752, 780). Upon arrival, Mr. Drury contacted Judge Charles Wofford of the Fulton County Criminal Court by telephone who instructed a Sergeant Marler to arrest the people on his warrant and to carry them to the county jail (R. 829-831). Sergeant Marler and a Captain Hamby instructed Mr. Drury to request that Miss Walker and her friends leave (R. 750). When they refused to leave, they were arrested (R. 748-750, 758-759). Miss

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[1] Krystal's is owned by a corporation organized under the laws of Tennessee (R. 761).

[2] Mr. Drury, on cross-examination, testified as follows:

> Q. It is not a membership corporation, is it? You don't issue any membership cards? A. We do not.
>
> Q. As a matter of fact, you feed any and everybody who comes in who is decently dressed and whose conduct is normal, if they are not Negroes and are unaccompanied by Negroes, is that not true? A. That is correct (R. 762).

Walker testified that if she had not been placed under arrest, she would have left. She did not wish to be arrested (R. 843).

How the Federal Questions Were Raised and Decided Below

Before pleading to the indictment, petitioner, relying on the Fourteenth Amendment to the Constitution of the United States, filed a plea in abatement, alleging that the Georgia trespass statute was being applied so as "to perpetuate, aid and abet, and to officially encourage and foster a scheme of racial discrimination in places of public accommodation within the City of Atlanta, Fulton County, Georgia" (R. 10). The plea in abatement was heard before the Honorable Durwood T. Pye of the Fulton County Superior Court (R. 116), who ordered the plea in abatement overruled and denied (R. 40).

On appeal to the Supreme Court of Georgia, petitioner asked reversal of her conviction on the ground that the Georgia trespass statute was being applied in a discriminatory fashion, under state sanction, in violation of the rights guaranteed by section one of the Fourteenth Amendment (Bill of Exceptions, pp. 4-5). The Court denied that the Georgia statute was being so applied, citing the U. S. Supreme Court:

> As pointed out by Justice Harlan, supra, the Supreme Court of the United States does not hold that State action denying equal protection may be found in the mere enforcement of trespass laws in relation to private business establishments from which the management, of its own free will, has chosen to exclude persons of the Negro race. *Infra*, p. 6a.

At the hearing on the motions in arrest of judgment and for a new trial, petitioner suggested a modification of sentence on the basis of the proposed Civil Rights Act, then pending before Congress. The Court determined that the legislation, if passed, would not legalize the conduct of petitioner and that any suggestion of modification of sentence prior to the passage of the Act was premature (R. 111-114). The Georgia Supreme Court declined to consider the question, noting that it was limited to rulings made by the trial court to which an exception had been made. It went on, however, "to demonstrate the fallacy of defendant's argument that this court should grant the motion for new trial on account of the passage of the Civil Rights Act," noting that whether or not a particular restaurant is a place of public accommodation within the meaning of the Act is a question of fact which can only be made by the trial court, *infra,* pp. 13a-14a.

A motion for rehearing, which raised the question of the abating effect of the passage of the Civil Rights Act and *Hamm* v. *Rock Hill,* 379 U. S. 306, which was then pending before the Supreme Court of the United States, on pre-enactment convictions, was overruled by the Georgia Supreme Court. A second motion for rehearing subsequent to the Georgia Supreme Court's decision, following the Supreme Court's decision in *Hamm* v. *Rock Hill,* 379 U. S. 306, was denied by the Georgia Supreme Court as untimely. *Infra,* pp. 16a, 17a.

REASONS FOR GRANTING THE WRIT

I.

The Decision Below Is in Conflict With This Court's Recent Decisions Holding That the Civil Rights Act of 1964 Abates the Prosecutions of Peaceful Sit-in Demonstrators.

The Court has held in four cases decided this term that Title II of the Civil Rights Act of 1964[3] abates pending prosecutions for peaceful sit-in demonstrations in establishments covered by that Act. *Hamm* v. *Rock Hill* and *Lupper* v. *Arkansas*, 379 U. S. 306; *Blow* v. *North Carolina*, 379 U. S. 684; *McKinnie* v. *Tennessee*, 33 U. S. Law Week 4319. In *Hamm* v. *Rock Hill, supra*, the Court relied on the common law doctrine of abatement (*United States* v. *Chambers*, 291 U. S. 217), and a provision of the act prohibiting punishment of persons attempting to exercise rights secured by the Act (§203(c)). Mr. Justice Clark wrote:

> The Civil Rights Act of 1964 forbids discrimination in places of public accommodation and removes peaceful attempts to be served on an equal basis from the category of punishable activities. Although the conduct in the present cases occurred prior to enactment of the Act, the still pending convictions are abated by its passage (p. 308).

The Court said that "the language of §203(c) supports a conclusion that non-forcible attempts to gain admittance

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[3] 78 Stat. 241.

to or remain in establishments covered by the Act, are immunized from prosecution . . ." (p. 311).

We submit that the present case is entirely controlled by *Hamm* v. *Rock Hill, supra,* and respectfully suggest that the judgment below should be summarily reversed on that ground. Indeed the Georgia Supreme Court unanimously followed *Hamm* and dismissed similar prosecutions in *Bolton* v. *State of Georgia,* No. 22,810, decided February 8, 1965.[4] But the decision below in the instant case was rendered before *Hamm,* and petitioner's second request for rehearing, filed after *Hamm* and *Bolton,* was denied on the ground that the Georgia Supreme Court had no power to consider such a petition after the term in which a decision was made.

It is undisputed that Krystal's restaurant had a policy of refusing to serve Negroes or white persons accompanying Negroes at its counter seats, and that petitioner was refused service, asked to leave, and arrested because she accompanied a group of Negroes to the restaurant and remained sitting at the counter. Petitioner was entirely peaceful and quiet while in the restaurant. It is plain that she was denied service because of the restaurant's policy of racial discrimination.[5] The trial judge gave an instruction to the jury indicating that racial exclusions were lawful, saying that a restaurant operator had the right to

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[4] The Fifth Circuit has also followed *Hamm* in ordering the dismissal of trespass prosecutions against 20 Atlanta sit-in demonstrators. *Rachel* v. *Georgia,* 5th Cir. No. 21,354, decided March 5, 1964.

[5] White persons accompanying Negroes to segregated lunch counters have been petitioners in prior sit-in cases in this Court, *Lombard* v. *Louisiana,* 373 U. S. 267, 268; *Avent* v. *North Carolina,* 373 U. S. 375.

exclude anyone for any reason including "personal" reasons (R. 908).

It is equally clear that Krystal's is a place of public accommodation within the meaning of Title II of the Civil Rights Act. It is a "restaurant, . . . lunchroom, [or] lunch counter . . . principally engaged in selling food for consumption on the premises . . ." (§201(b)(2), Civil Rights Act of 1964), and it "offers to serve interstate travelers" (§201(c)(2)). The Krystal Company, a Tennessee corporation, operates a chain of five restaurants in Atlanta. The establishment on Peachtree Street, where petitioner was arrested, had a 25-stool food counter which was open 24 hours a day and served about one thousand customers per day (R. 774). The manager of Krystal's five Atlanta restaurants acknowledged that the restaurant served "everybody who comes in who is decently dressed and whose conduct is normal, if they are not Negroes and are unaccompanied by Negroes" (R. 762). Thus, it is clear that Krystal's, being open to the general public, "offers to serve interstate travelers" within the meaning of the Civil Rights Act. *Hamm* v. *Rock Hill*, 379 U. S. 306, 309. We submit that in light of its unanimous decision in *Bolton* v. *State, supra*, there is little reason to doubt that the court below would vacate this conviction if it had had an opportunity to consider the case after this Court's decision in *Hamm* v. *Rock Hill*.[6] However, in view of the undisputed

[6] The opinion below implies that the applicability of the Act to the restaurant raised an issue of fact which an appellate court could not determine, but this statement, written prior to *Hamm*, was quite obviously made under a misapprehension as to the factual showing necessary to demonstrate coverage under the Act. In its February 8, 1965 opinion in *Bolton* v. *State*, No. 22810, the Georgia Supreme Court applied the *Hamm* rule on exactly the kind of evidence which is in this record, stating merely that the restau-

facts and the settled law, it is submitted that this Court should vacate the conviction and order that the prosecution be dismissed as it has done in each of the other sit-in cases decided this term.[7] It is submitted that simple justice requires that petitioner, an 18-year-old student who was given an extraordinarily severe sentence (18 months confinement and $1,000 fine), be freed from further prosecution forthwith just as was done in the *Hamm, Lupper, Blow* and *McKinnie* cases, *supra*.

II.

Petitioner's Conviction Enforced Racial Discrimination in Violation of the Fourteenth Amendment to the Constitution of the United States.

If for some reason the Court finds the abatement principle inapplicable here, we respectfully urge the Court to consider once again whether the Fourteenth Amendment operates to vacate this prosecution without the benefit of the Civil Rights Act. As Mr. Justice Clark noted in *Hamm* v. *Rock Hill*, 379 U. S. 306, at p. 316, " . . . some of the Justices joining this opinion believe that the Fourteenth Amendment does so operate; others are of the contrary opinion."

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rant involved served "everybody who wishes to patronize its place of business, except Negroes."

[7] We submit that the case is so plain that it would not be appropriate or fair to petitioner to prolong the litigation by remanding the case to the court below for reconsideration. Cf. *Fields* v. *South Carolina*, judgment vacated 372 U. S. 522, judgment reversed 375 U. S. 44; and *Henry* v. *Rock Hill*, judgment vacated 375 U. S. 3, judgment reversed 376 U. S. 776.

A. *The Enforcement of Racial Discrimination by Means of the State Judicial Power and State Police and Prosecutors Is Such an Application of State Power as to Violate the Guarantees of the Fourteenth Amendment.*

Shelley v. *Kraemer*, 334 U. S. 1, established that state action sufficient to bring to bear the guarantees of the Fourteenth Amendment is present in the use of state judicial machinery to enforce a privately originated scheme of racial discrimination. Unless that case is to be overruled, it applies *a fortiori* to the instant case where not only the state judicial power but also the powers of the state police and prosecutors have sanctioned the permitted custom of segregation. Here, the arresting officers had been thoroughly briefed in instructing restaurateurs in the appropriate warning request necessary to effectuate arrest. Here, the judicial proceedings were criminal in nature, carried on by the public prosecutor at public expense with policemen testifying in the interest of the state in knowing support of a discriminatory scheme, sanctioning the latter within its own public order, and not merely standing by to enforce private rights by civil process as in *Shelley* v. *Kraemer, supra.* Cf. *Barrows* v. *Jackson*, 346 U. S. 249.

Virtually universal though nominally "private" discrimination in places of public accommodation, backed up by alert police and by criminal prosecutions, is the exact functional equivalent of restaurant segregation imposed by city ordinance. It makes no difference to a Negro which of two legal formalities assures his being barred from all the good restaurants and most of the bad ones in town, any more than it makes a difference to him which doctrinal route—"zoning" [8] or the *Shelley* v. *Kraemer* "private covenant"—led to his being unable to live in the neighborhood.

[8] See, *Buchanan* v. *Warley*, 245 U. S. 60.

It is asserted that the state is not enforcing racial discrimination, but implementing a property right. The distinction is a false one; the state is enforcing racial discrimination by implementing a property right, just as in *Shelley* the state was enforcing racial discrimination by implementing a contract right which was also a property right.

B. *The State Is Involved in the Acts of Racial Discrimination Sanctioned in These Cases, Since They Were Performed in Obedience to a Widespread Custom, Which in Turn Has Been Confirmed and Maintained by State Law.*

Petitioner submits that where the individual act of segregation is performed under the influence of a widespread public custom of segregation, and where this widespread public custom has in turn been supported by formal state law, then the act of segregation is infected with state power. Where a state has, like Georgia,[9] until times so recent as

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[9] Georgia statutes calling for separation of the races have included:

Endowed Institutions. Const. 1945, Art. VII, §2-5404, unchanged as of 1963.

Billiard and Poolrooms. Ga. Code Ann., §84-1603, unchanged as of 1963.

Education. Const. 1945, Art. VII, §2-6401, unchanged as of 1963.

Public Schools. Ga. Code Ann., §32-909, repealed as of 1961.

Juvenile Delinquents. Ga. Code Ann., §77-701, §77-613, unchanged as of 1963.

Colleges and Universities. Ga. Code Ann., §§32-101–32-103, repealed as of 1961.

Miscegenation Prohibited. Ga. Code Ann., §53-212, unchanged as of 1963.

Prisons. Ga. Code Ann., §77-315, unchanged as of 1963.

Transportation. Ga. Code Ann., §§18-205–18-210, unchanged as of 1963.

Motor Vehicles. Ga. Code Ann., §68-513, unchanged as of 1963.

to fall within the formative years of people now in their prime, maintained a Jim Crow regime by law, state action is causally traceable into the discrimination. Where the law has *substantially* supported the custom of segregation the probability of a causal nexus is sufficient to shift the burden of proving the absence of such a nexus to the state. *Civil Rights Cases*, 109 U. S. 3, 13; *Burton* v. *Wilmington Parking Authority*, 365 U. S. 715; 9 Wigmore, *Evidence* (3d ed., 1940) §§2486, 2488.

C. *The State Has Here Denied Equal Protection of the Laws, by Maintaining a Regime of Laws Which Fails to Furnish Such Protection to Petitioners, and Which Instead Subordinates Their Claim of Equality in Public Life to a Narrow and Technical Property Claim.*

The obligation of the state under the Fourteenth Amendment is an affirmative one—the affording of equal protection of the laws. That obligation is breached when, as here, the state maintains a regime of laws which denies to petitioners protection against public racial discrimination, and instead, subordinates their claim of equality in the common and public life of the state to a narrow property claim and enforces the subordination by the extreme sanction of the criminal law.

It is submitted that the equal protection clause of the Fourteenth Amendment imposes upon the state the obligation of maintaining a regime of law in which Negroes, whose protection was the dominating purpose of the Fourteenth Amendment, are in fact protected against gross discrimination in the common public life of the states. On this issue, we refer to the concurring opinion of Mr. Justice Goldberg in *Bell* v. *Maryland*, 378 U. S. 226, 286-317, who reasoned that the Fourteenth Amendment requires the

states to maintain legal systems in which Negroes, and their companions, such as Miss Walker, would be protected against discrimination in restaurants otherwise open to the general public. We refer also to the history garnered there which by a very heavy preponderance establishes that the guarantee to Negroes of equal access to places of public accommodation ought to be taken as one of the characteristics of the system of law which the Fourteenth Amendment requires the state to maintain.

The states are not neutral; the determination of the ranking to be given the interest asserted by the members of society, and hence of the legal sanctions to be applied in adjusting these interests, is in the general case the business of the state. *The Slaughter House Cases,* 83 U. S. (16 Wall.) 36; *Strauder* v. *West Virginia,* 100 U. S. 303. It would be strange indeed if the state's interest in maintaining a narrow "property" right, which consists in nothing but the exclusion of Negroes, was to be found sufficient to justify a state in the knowing support of public racial discrimination.

It has long been recognized that a state, by merely permitting activity which frustrates a constitutional guarantee, may violate the Constitution. See *Terry* v. *Adams,* 345 U. S. 461, 473, 477. The case at bar is sharper. Here the state not only permits conduct which frustrates and makes worthless the Fourteenth Amendment guarantee against segregation by public power, but also puts the weight of its criminal sanctions behind that conduct. Cf. *Burton* v. *Wilmington Parking Authority,* 365 U. S. 715; *McCabe* v. *Atchison, Topeka & S. F. Ry. Co.,* 235 U. S. 151; *Lynch* v. *United States,* 189 F. 2d 476 (5th Cir. 1951), cert. den. 342 U. S. 831; *Catlette* v. *United States,* 132 F. 2d 902 (4th Cir. 1943).

D. *The Theories of "State Action" Urged by Petitioner in the Foregoing Arguments Need Not Result in the Subjection of the Private Life of Individuals to the Norms of the Fourteenth Amendment.*

The theories of "state action" urged above may rationally be limited in their incidence by an interpretation of the substantive meaning of the equal protection clause, which recognizes other constitutional demands. The personal and private life of individuals need not be subjected to Fourteenth Amendment norms. This result, unwanted and absurd, is logically avoided by the discernment and use of a canon of interpretation of the Fourteenth Amendment, limiting that Amendment's force to the functionally public life. In the instant case, the record shows no private or personal associational interest at stake. Indeed, this case concerns events in a public restaurant where no one expects to choose his surrounding company and where customer-by-customer "choice" by proprietors or managers is virtually unknown. Admittedly distinctions between public and private and a determination of what constitutes "state action" are difficult, but such decisions must always be made by the court. However, this is not the case at bar. Here the distinction between the public communal life and the individual private life is definite and precise.

CONCLUSION

WHEREFORE, for the foregoing reasons, petitioner prays that the petition for writ of certiorari be granted.

Respectfully submitted,

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APPENDIX

Opinion

(Decided: November 5, 1964)

IN THE

SUPREME COURT OF GEORGIA

MARDON R. WALKER,

—v.—

THE STATE.

MOBLEY, *Justice.*

1. The demurrer attacks the statute upon the ground that it denies equal protection and due process guaranteed by the 14th Amendment of the United States Constitution (Code §1-815) and due process guaranteed by the Georgia Constitution (Code Ann. §2-103). This court has settled these questions adversely to her contentions in Clark v. State, 219 Ga. 680, 135 S. E. 2d 270, and in those cases at pages 829 and 830 of the same volume. The court properly overruled the general demurrer. This court considers these cases sound and correct, and accordingly denies request of counsel that they be overruled.

2. Defendant in her plea in abatement contends that the trespass Act is being applied by public authorities representing the State itself in such manner as to amount to a denial by the State of equal protection and due process of

law as guaranteed to her by the Federal Constitution and due process guaranteed by the Constitution of Georgia.

She alleges specifically that the Act is being applied in her case so as to perpetuate, encourage, aid and abet, and to officially encourage and foster a scheme of racial discrimination in places of public accommodation in Atlanta, Fulton County, Georgia; that the Police Department of Atlanta, acting through its officers as agents of the State, arrested defendant and others for refusing to leave the Krystal Co., a place of public accommodation licensed by the City of Atlanta, after having been requested to leave the place solely because the Krystal serves Negroes on a discriminatory basis, that is only upon a take out, stand up basis, and members of the white race are not served when accompanied by Negroes; that State action was involved because a warrant was improperly and illegally issued by a Judge of the Civil-Criminal Court of Fulton County, without proper application therefor, and police officers of the city advised and instructed agents of Krystal as to the manner in which defendant's arrest could be procured; that other State action results from failure of the police department to enforce Code §§52-103 and 52-105, which require every eating place to accommodate and receive all guests, and that this is a part of the scheme to permit continued racial segregation; that only Negroes and Caucasians accompanied by Negroes have been arrested in the City of Atlanta for violation of the trespass Act, and that at the time defendant was arrested she was exercising rights protected by Art. I, Sec. I, Par. III of the Constitution of Georgia and the 1st Amendment of the United States Constitution, as made applicable to the States by Sec. I

of the 14th Amendment, in that they sat peacefully at the counter of the Krystal as an act, protest, and expression of condemnation, and as a way of publicly and directly criticizing racial discrimination practiced by the Krystal.

The trial court after hearing evidence, found against the contentions of the defendant and denied the plea in abatement.

(a) The trial court recognized, and properly so, "that a law, even though fair and constitutional on its face, may not legally be applied to achieve an unconstitutional result or be legally applied so as to deprive any person of rights, privileges, and immunities under the Constitution of Georgia and of the United States of America," citing Herndon v. Lowry, 301 U. S. 242, 57 S. Ct. 732, 81 L. Ed. 1066, and that "if it is applied and administered by public authority with an evil eye and an unequal hand, so as practically to make unjust and illegal discriminations between persons in similar circumstances, material to their rights, the denial of equal justice is still within the prohibition of the constitution," citing Yick Wo v. Hopkins, 118 U. S. 356, 373, 374, 6 S. Ct. 1064, 1073, 30 L. Ed. 220.

The vital and controlling issue made by the plea in abatement is whether State action was involved in the alleged denial of equal protection of the law as guaranteed by the 14th Amendment and due process under the Federal and State Constitutions. It is undisputed that under decisions of the United States Supreme Court State action must be involved. See Peterson v. City of Greenville, 373 U. S. 244, 247, 83 S. Ct. 1119, 1121, 10 L. Ed. 2d 323, where that court stated, "private conduct abridging individual rights does no violence to the Equal Protection Clause unless to

some significant extent the State in any of its manifestations has been found to have become involved in it." The court held in that case that there was State action because a city ordinance required separation of the races in restaurants.

Neither the State of Georgia has a statute nor the City of Atlanta an ordinance requiring segregation of races in restaurants. Thus that case is clearly distinguishable from this one.

In Lombard v. Louisiana, 373 U. S. 267, 83 S. Ct. 1122, 10 L. Ed. 2d 338, neither Louisiana nor New Orleans had a statute or ordinance requiring segregation, but the court held that there was State action because the mayor and superintendent had announced that such "sit-in demonstrations" would not be permitted. The court found from the evidence here that just the opposite was the policy in Atlanta, for the Board of Aldermen had adopted a resolution approved by the mayor urging all private businesses and others to give consideration to removal of all barriers as they relate to jobs and public accommodations and that place restrictions on account of race, creed, color or national origin. And found further that the police had refused to make arrests where the statute under consideration had been violated in their presence and had permitted demonstrators to take charge of Leb's Restaurant by entering and remaining many hours and blocking all entrances to the restaurant. This case is clearly distinguishable from Lombard.

In discussing the cases of Peterson, Lombard, Gober, Avent, and Shuttlesworth Justice Harlan in Peterson v. Greenville, 373 U. S. 244, 249, 83 S. Ct. 1119, 1133, stated:

"In deciding these cases the Court does not question the long-established rule that the Fourteenth Amendment reaches only state action. Civil Rights Cases, 109 U. S. 3, 3 S. Ct. 18, 27 L. Ed. 835. And it does not suggest that such action, denying equal protection, may be found in the mere enforcement of trespass laws in relation to private business establishments from which the management, of its own free will, has chosen to exclude persons of the Negro race. Judicial enforcement is of course state action, but this is not the end of the inquiry. The ultimate substantive question is whether there has been '[S]tate action of a particular character' (Civil Rights Cases, supra, at 11, 3 S. Ct. at 21)—whether the character of the State's involvement in an arbitrary discrimination is such that it should be held responsible for the discrimination."

The thrust of defendant's argument is that "the issuance of an oral telephonic warrant (by Judge Wofford) is 'misuse of power' possessed by virtue of State law and made possible only because the judge was clothed with the authority of law in aid and support of an admitted practice of racial discrimination for which the State is accountable," citing United States v. Classic, 313 U. S. 299, 61 S. Ct. 1031, 85 L. Ed. 1368 (1941) and Justice Harlan's dissent in Peterson v. City of Greenville, 373 U. S. 244, 249, 83 S. Ct. 1119 (1963).

In the first place there is no such thing as a "telephonic warrant," or an oral warrant. Our law makes no provision for such. See Code §§27-102, 27-103, 27-104, 27-105, as to authority for issuance of warrants in criminal cases.

In the second place, the evidence shows without dispute that the alleged offense was committed in the presence of

the arresting officer. Thus, he did not need a warrant. Code §27-207. He testified that he called Judge Wofford over the telephone, that Judge Wofford told him that "warrants are issued for the subjects there that refused to leave." He also testified, "I considered myself arresting for a violation of the law, whether it be on the warrant, or whether it be in my presence, frankly, I don't know" and in reply to the question, "You didn't apply for the warrant, did you?" he stated, "No, I didn't need one." There was testimony from another officer that Judge Wofford told him he would issue warrants for them. Later in the afternoon he issued warrants, after getting the required affidavits from the manager of the Krystal. The judge was fully authorized to find that there had been no misuse of power by Judge Wofford.

As pointed out by Justice Harlan, supra, the Supreme Court of the United States does not hold that State action denying equal protection may be found in the mere enforcement of trespass laws in relation to private business establishments from which the management, of its own free will, has chosen to exclude persons of the Negro race. The evidence in this record clearly shows that the management of the Krystal in the exercise of its own free will and its right to do so excluded Negroes from service in its restaurant, and that the police only responded to a call from the manager of the Krystal, made the arrest only after the defendant refused to leave the premises after being requested to do so by the manager in the presence of the police and after she refused to leave.

(b) The contention that State action resulted from failure of the police to enforce Code §§52-103 and 52-105 is

without merit. Code §52-103 relates solely to the duty of an innkeeper to receive guests and 52-105 to liens to which they are entitled.

(c) The evidence fully supported the finding of the trial judge that the contention that "only Negroes and Caucasians accompanied by Negroes have been arrested in the City of Atlanta for violation of the anti-trespass Act" was not proved, for the evidence showed that others have been arrested in Atlanta for violation of the Act.

(d) The defendant's contention that she and her companions were exercising their rights of protest and expression of condemnation of the practice of racial discrimination, and that they were denied their right of freedom of speech as guaranteed by the Federal and State Constitutions, is without merit.

It is clear that the statute is not directed at what they said, but what they did—remaining on the premises of the Krystal Co. after being requested to leave said premises by the agent and employee of the owner. As pointed out by Justice Black in his dissenting opinion in Bell v. Maryland, 378 U. S. 226, 325, 84 S. Ct. 1814, 1868, 12 L. Ed. 2d 822, "[N]one of our prior cases has held that a person's right to freedom of expression carries with it a right to force a private property owner to furnish his property as a platform to criticize the property owner's use of that property. Cf. Giboney v. Empire Storage & Ice Co., 336 U. S. 490, 69 S. Ct. 684, 93 L. Ed. 834 (1949)." Nor has any decision of this court so held.

3. The motion in arrest of judgment, which was based on the same grounds as the general demurrer, was not filed

during the term of the court at which such judgment was obtained; thus, it was filed too late, and raises no question for this court. See Code §110-703; McEwen v. State, 108 Ga. App. 352, 133 S. E. 2d 38; Regopoulas v. State, 116 Ga. 596, 42 S. E. 1014.

4. Special ground 1 of the motion for new trial complains on two grounds of the charge of the court "that the private proprietor of a restaurant is free to serve whom he pleases and may exclude on purely personal grounds. He is under no duty to serve everyone who applies to him. He may accept some customers and reject others on purely personal grounds. This law applies to a short-order restaurant operated by a private company and managed by its agents and employees."

The charge is a correct statement of the law of this State. At common law the proprietor of a private business such as this restaurant was free to serve only whom he pleased and could exclude others with or without reason, according to his own personal wishes. See Alpaugh v. Wolverton, 184 Va. 943, 36 S. E. 2d 906, 908, which states: "The proprietor of a restaurant is not subject to the same duties and responsibilities as those of an innkeeper, nor is he entitled to the privileges of the latter. 28 Am. Jur., Innkeepers, §20, p. 623; 43 C. J. S., Innkeepers, §20, subsec. b, p. 1169. His rights and responsibilities are more like those of a shopkeeper. Davidson v. Chinese Republic Restaurant Co., 201 Mich. 389, 167 N. W. 967, 969, L. R. A. 1918E, 704. He is under no common-law duty to serve everyone who applies to him. In the absence of statute, he may accept some customers and reject others on purely personal grounds. Nance v. Mayflower Tavern, Inc., 106 Utah 517,

150 P. 2d 773, 776; Noble v. Higgins, 95 Misc. 328, 158 N. Y. S. 867, 868." Georgia adopted the common law of England and has never adopted legislation providing otherwise.

The first complaint that the evidence did not authorize the charge because there was no evidence that the Board of Directors of the Krystal Co. had ever authorized or directed its manager, Mr. Drury, to refuse service to the defendant, a white person, on a sit down basis because of the race of the people accompanying her, and that he was without authority to do so is without merit. The evidence was ample to show that Mr. Drury was the authorized agent of the Company and in charge of the business, that the established policy of the Company was to sell to white or Caucasian people on a seated basis and to others on a take out basis, and the manager had authority to carry out the policy of the Company as to whom they would serve and in what manner. There was no evidence that he did not have such authority.

The second complaint is that the charge is incomplete as an abstract statement of law in that restaurants which are situated in hotels, taverns, and inns are obligated to accommodate all guests under Code §52-103. This complaint is without merit because this restaurant was not situated in a hotel, tavern, or inn.

5. Special ground 2 complains that the court after charging that "The indictment alleges as follows: said business not being an instrumentality of the State, or of any other government body. This is an essential and material allegation which must be established in order to convict * * *." erroneously charged that "if the State of Georgia should

show that the business alleged was a short order restaurant owned and operated by The Krystal Company, a privately owned company, and operated by its agents and employees, such would constitute proof of this allegation."

The contention was that this charge amounted to the court's interpreting and expressing an opinion that the State had sustained its burden of proof as to the allegation. The ground is without merit. This was not an expression of opinion by the judge, but a correct statement of the law. If the business was shown to be a short order restaurant owned and operated by The Krystal Co., a privately owned company, it would establish that the Krystal was not an instrumentality of the State of Georgia, or any other governmental body in the absence of any evidence that it was an instrumentality of the State or other governmental body, as here. The evidence amply authorized the charge.

6. Special ground 3 assigns error upon the admission of the original business license issued by the City of Atlanta to the Krystal Co. upon the ground that it was not certified and that no showing was made that it was issued by proper authority or that it was kept in regular course of business. The evidence showed that the document was the original license issued by the City of Atlanta to the Krystal Co.; thus proof of certification is not required. There is no merit in the complaint that no showing was made that it was issued by proper authority or kept in regular course of the business. It hung on the wall of the restaurant, carried the signature of the Municipal Revenue Collector of the City of Atlanta, acknowledged receipt of $162.00 for the licensing of Krystal Restaurant, 70 Peachtree Street,

Atlanta, from January 1, 1964, to December 31, 1964, and the evidence was that it was the license issued by the city to Krystal for receipt of the fee or tax imposed by the city. If error to admit the license, it would have been harmless.

7. Special ground 4 complains of the admission of photographs of other persons arrested at the Krystal at the same time as the defendant, the ground of objection being that the photos were not properly authenticated, in that there was no evidence that the machine, the camera which took the pictures, was working, or who was taking the pictures. The arresting officer testified that they were pictures of those arrested along with defendant. The ground obviously has no merit.

8. The question presented by special grounds 5, 6, and 7 is whether evidence of William Kontoes as to the participation by the defendant in the sit-in and demonstrations against Leb's Restaurant, which occurred twelve days after the happening of the acts for which she is on trial, was admissible on the trial of this defendant. This court in Green, alias Smith v. State, 172 Ga. 635, 158 S. E. 285, after stating the general rule that generally in a criminal case, evidence as to commission of other crimes of a similar nature than that charged in the indictment by the accused is inadmissible, pointed out that there is an exception to this rule, and that such evidence is admissible and competent proof of motive, scheme, design and intent of the defendant, and held that evidence of the commission of offenses of a similar nature subsequent to the commission of the deed for which he was indicted was admissible. See also Phillips v. State, 206 Ga. 418, 421 (4d), 57 S. E. 2d 555.

As to admission of evidence of similar crimes to show bent of mind, see Suber v. State, 176 Ga. 525(1), 168 S. E. 585; general plan, scheme or motive see Tucker v. State, 180 Ga. 87(1), 178 S. E. 152 and Sisk v. State, 182 Ga. 448(1), 185 S. E. 777.

The defendant in her statement to the jury stated that she and her friends from Spelman College were downtown and wanted to get something to eat, and that they went to the Krystal for that purpose; that "I went there to get something to eat—we were just students who wanted something to eat"; that she did not want to get arrested and that she was not asked to leave the restaurant. The testimony of Kontoes, who was manager of Leb's, a privately owned and operated restaurant in Atlanta in the vicinity of the Krystal, was offered by the State in rebuttal of the defendant's statement. His evidence in brief was that the defendant had participated in a large demonstration of some forty people inside the restaurant and about two hundred on the outside who forced the closing of Leb's for some eight hours on January 25, 1964. Defendant was on the outside, and she would read notes placed on the windows by those on the inside, and then pass the information to the leader of the demonstrators, and relay his messages back to those inside. The evidence indicated that she was one of the active leaders and participants in that demonstration and the forced closing of Leb's Restaurant for business on that occasion.

When this testimony was admitted, the court called the jury's attention "particularly to the fact that the defendant is on trial only for the offense charged in the bill of indictment, and this evidence objected to is admitted solely

for the purpose of illustrating, if it does, the defendant's guilt or innocence of the transaction charged in the indictment and for the purpose of rebutting, if it does, some statement made by her in her unsworn statement before you." See Suber v. State, 176 Ga. 525(1), 168 S. E. 585.

This testimony was admissible to rebut defendant's contention that she and her companions innocently went to the Krystal to get something to eat and that she was not asked by the manager of the Krystal, Mr. Drury, to leave and that she did not want to be arrested. It was a circumstance which the jury could consider in deciding whether her evidence was true, or whether she knowingly went to the restaurant to demonstrate against Krystal's policy not to serve Negroes, or whites accompanied by Negroes, and that she was asked to leave by the police and refused to do so, and that she wanted to be arrested.

We agree with the following statement by the trial judge in his judgment ruling on this ground: "The real question is whether subsequent transactions at Leb's either tended to rebut some statement made by the defendant in her unsworn statement before the jury, or tended to illustrate the truth or falsity of some allegation in the bill of indictment. In the opinion of the court this evidence did both."

9. The defendant in her brief argues that the general grounds of her motion for new trial should be sustained because of the passage of the Civil Rights Act of 1964, which abates her conviction and prospective punishment because section 203(c) thereof provides that "[n]o person shall * * * punish or attempt to punish any person * * * exercising or attempting to exercise any right or privilege secured by

section 201 and 202." Section 201 is the public accommodations section of the Act, which provides that "all persons shall be entitled to the full and equal enjoyment of goods, services * * * of any place of public accommodation, as defined in this section, without discrimination or segregation on the ground of race, color * * *."

This ground raises no question for consideration of this court, as under the Constitution of 1945, Art. VI, Sec. II, Par. IC (Code Ann. §2-3704) this court has no original jurisdiction but is a court alone for the trial and correction of errors of law from the superior courts and certain other enumerated courts, and this court is limited in its consideration of the case to the rulings actually made by the trial court to which there is exception. MacNeill v. Fulton County et al., 210 Ga. 119(1), 123, 78 S. E. 2d 40. See also, Johnson v. Lancaster, 75 Ga. 39(4); Vanderford v. Brand, 126 Ga. 67, 54 S. E. 822. No ruling on this question was invoked by counsel or made by the trial court.

To demonstrate the fallacy of defendant's argument that this court should grant the motion for new trial on account of the passage of the Civil Rights Act, whether this particular restaurant comes within the provisions of the Civil Rights Act depends upon whether it is a place of public accommodation within the meaning of the Act. The Act, section 201, provides that a restaurant is a place within the meaning of the act "if its operations affect commerce, or if discrimination or segregation by it is supported by State action." It is readily apparent that the determination of that question is one of fact, which can only be made in the trial court.

The general grounds of the motion for new trial are without merit.

Judgment affirmed.

All the Justices concur.

Judgment

(Decided: November 5, 1964)

IN THE
SUPREME COURT OF GEORGIA

MARDON R. WALKER,

v.

THE STATE.

The Honorable Supreme Court met pursuant to adjournment. The following judgment was rendered:

MARDON R. WALKER v. THE STATE.

This case came before this court upon a writ of error from the Superior Court of Fulton County; and, after argument had, it is considered and adjudged that the judgment of the court below be affirmed. All the Justices concur.

Order

(Decided: November 19, 1964)

IN THE
SUPREME COURT OF GEORGIA

MARDON R. WALKER,

v.

THE STATE.

The Honorable Supreme Court met pursuant to adjournment. The following order was passed:

MARDON R. WALKER v. THE STATE.

Upon consideration of the motion for a rehearing filed in this case, it is ordered that it be hereby denied.

Order

(Decided: March 15, 1965)

IN THE
SUPREME COURT OF GEORGIA

MARDON R. WALKER,

v.

THE STATE.

The Honorable Supreme Court met pursuant to adjournment. The following order was passed:

MARDON R. WALKER v. THE STATE.

It is ordered that the filing of the second motion for a rehearing offered on March 1, 1965 (which was during the January Term, 1965), to review this Court's judgment rendered on November 5, 1964 (which was during the September Term, 1964), be hereby disallowed, in view of the provision of Rule 40 of the Rules of the Supreme Court (Code §24-4544; 214 Ga. 874) inhibiting this Court's consideration of any motion for a rehearing unless filed in the office of the Clerk during the term at which the judgment sought to be reviewed was rendered.